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No. 82-1086

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAVID H. GROOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his conviction for willfully aiding and assisting in, and procuring, counselling, and advising the preparation of false income tax returns, asserting that the evidence was insufficient to establish that he acted willfully and that his trial attorney's representation was ineffective.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on 16 counts of willfully aiding and assisting in, and procuring, counselling and advising the preparation of false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(2) (Pet. 4). The court sentenced him to two years' imprisonment, fined him $16,000, and imposed two-years' probation following his imprisonment (Pet. App. 38a-39a). The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial showed that between 1975 and 1978 petitioner, a certified public accountant and professor of accounting (Pet. 4), prepared federal income tax returns for a family coal mining business, known first as Harmon Coal Company and later as Harmon Mining Company, and for each of its partners, John and Kenneth Harmon and their wives (Pet. 13; C.A. App. 5-17). Between 1975 and 1977, petitioner also prepared joint federal income tax returns for Thomas and Shirley Huff, who were in the coal mining business (Pet. 13; C.A. App. 18-20). Petitioner reported income on these returns in accordance with a scheme he devised under which reporting of the coal companies' income was deferred (Pet. 4-5, 13). Under this scheme, the coal companies had some of their customers pay for coal purchases with checks payable to B&G Coal Company, a purported coal brokerage firm set up by petitioner (Tr. 416-418, 684-690). The coal companies sent these checks to B&G Coal without recording the receipts on their books (Tr. 417-422, 686-690), and petitioner deposited the money into separate B&G bank accounts maintained for them (Tr. 424-425, 684). Together with petitioner, John and Kenneth Harmon and the Huffs had signature authority over their respective B&G bank accounts (Tr. 424-425, 685, 868). Under the arrangements with his clients, petitioner would return money to the coal companies when they needed or wanted it (Tr. 420, 432-433, 688). The receipt of the money would be recorded on the books of the coal companies as income at that time (Tr. 417-422, 686-690). Thus, income would be reported for the year in which money was returned to a coal company rather than the year in which payment for coal was originally received (Pet. 13). As a result of this scheme, the Harmons and their partnership underreported their incomes for 1974 through 1977, and the Huffs underreported their income for 1974 and overreported their incomes for 1975 and 1976 (Pet. 13-14; C.A. App. 5-20).

1. Petitioner challenges (Pet. 10-17) the sufficiency of the evidence to support his conviction. He contends that the evidence does not support a finding that he acted willfully, since there was doubt whether the taxpayers were required to report the coal sale proceeds received by B&G Coal Company in the years of receipt. But this claim of evidentiary insufficiency was fully reviewed and rejected by the court of appeals (Pet. App. 1a), and petitioner has not advanced any reason why this Court should now consider this fact-bound issue.

At all events, there was abundant evidence from which a jury could reasonably find that petitioner acted willfully, *i.e.*, that he voluntarily and intentionally violated a known legal duty. *United States* v. *Pomponio*, 429 U.S. 10 (1976). The evidence showed that petitioner knew the principles of tax law involved in this case. He was a certified public accountant and a professor of accounting (see *United States* v. *Rischard*, 471 F.2d 105, 108-109 (8th Cir. 1973)) and, according to his secretary's testimony (Tr. 329-330), did extensive tax law research in connection with his scheme for deferring the receipt of income for income tax purposes.

The diversions of income under the scheme were obvious shams. Petitioner's clients, not B&G Coal, made coal sales, earned the income from the sales, and actually received the payments for coal (Tr. 419, 440-442, 683-684, 688, 691-692). The payments transferred to B&G Coal by the clients were required to be returned to the clients on demand (Tr. 420, 688) and were deposited to bank accounts over which the clients had signature authority (Tr. 424-425, 685, 868). Thus, there was no basis for a good faith belief that, for tax

purposes, petitioner's clients did not receive the income diverted to and held for them by B&G Coal.[1]

During an Internal Revenue Service investigation of petitioner, he falsely told an IRS agent that the money that went into B&G Coal represented fees for his own brokerage services (Tr. 1045-1048). Both John Harmon and Thomas Huff testified that they never paid petitioner any brokerage fees for coal transactions (Tr. 440-442, 691-692). Petitioner's false exculpatory statement was evidence from which the jury could have concluded that petitioner was aware that the scheme was a complete sham and therefore find that he had willfully assisted in the filing of false returns. *United States* v. *Walsh*, 627 F.2d 88, 92 (7th Cir. 1980); *United States* v. *Allen*, 522 F.2d 1229, 1232 (6th Cir. 1975), cert. denied, 423 U.S. 1072 (1976); *United States* v. *Rischard, supra*, 471 F.2d at 108-109.

Finally, petitioner diverted large sums of money from B&G Coal for his own purposes (Tr. 1081-1084). Thus, the jury could infer that petitioner's advice to his clients was not rendered in good faith, but was part of a scheme to gain access to the clients' money for his own purposes.[2]

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[1]Even without signature authority over their B&G accounts and the right to demand the immediate return of funds to themselves, under well-settled tax law, petitioner's clients would have been required to report diverted payments as income. A taxpayer who arranges for the proceeds of a transaction of his own to be paid to another party is deemed to have received the income himself. *Helvering* v. *Horst*, 311 U.S. 112 (1940); *Lucas* v. *Earl*, 281 U.S. 111 (1930).

[2]Petitioner asserts (Pet. 6-7, 16-17) that there was insufficient evidence to establish as a matter of law that he acted willfully because an agent of the Internal Revenue Service admitted at trial that there "might well be" a difference of opinion between people of equal expertise as to when the payments became income to petitioner's clients. But a reading of the agent's testimony (Tr. 1002-1007) reveals that the agent merely said that there was a possibility that there could be a disagreement as to when the payments should be recognized as income to petitioner's

2. Petitioner further contends (Pet. 18-20) that he was prevented from testifying in his own behalf because his defense counsel at trial threatened to withdraw if he took the stand. He also urges (Pet. 21-22) that his trial attorney's performance (not the attorney representing him before this Court) was ineffective because no defense testimony or evidence was offered at trial despite the alleged facts that petitioner insisted on testifying, an expert accounting witness was available to endorse petitioner's tax deferral plan, and numerous character witnesses were available. But petitioner did not present these claims to the district court; rather, he raised them for the first time in his petition for rehearing filed with the court of appeals (Pet. 9-10). Thus, since the record contains no facts upon which to evaluate petitioner's claims, there is no basis for review of them by this Court.[3] *United States ex rel. McCann* v. *Adams*, 320 U.S. 220, 221 (1943); *Waley* v. *Johnston*, 316 U.S. 101, 104 (1942). Petitioner's claim must be raised by way of a motion under 28 U.S.C. (& Supp. V) 2255. See, e.g., *United States* v. *Holy Bear*, 624 F.2d 853, 856 (8th Cir. 1980); *United States* v. *Brown*, 591 F.2d 307, 310 (5th Cir.), cert. denied, 442 U.S. 913 (1979); *United States* v. *Carlson*, 561 F.2d 105, 109 (1st Cir.), cert. denied, 434 U.S. 973 (1977).

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clients, not that there was any real doubt upon this issue. At all events, the jury heard the agent's testimony and the evidence bearing upon petitioner's intent, and it obviously concluded that petitioner was aware that his scheme was improper.

[3]Petitioner relies on an affidavit of his wife to support his claim that his counsel's alleged threat to withdraw presented him with a "Hobson's choice" of foregoing his right to counsel or his right to testify (Pet. 8, 18-20; Pet. App. 10a-11a). But Mrs. Groom's affidavit negates this claim. She states (Pet. App. 11a) that defense counsel advised petitioner that in the event of counsel's withdrawal, petitioner "could always get another attorney * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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